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No. 79-729

In the Supreme Court of the United States

OCTOBER TERM, 1979

ERNEST M. MILLICAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 600 F.2d 273.

JURISDICTION

The judgment of the court of appeals was rendered on August 2, 1979. The court denied a petition for rehearing on October 9, 1979. The petition for a

writ of certiorari was filed on November 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's presence before the trial court was secured through defective process.

2. Whether the trial court correctly instructed the jury.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was found guilty of willfully failing to file a federal income tax return for 1975, in violation of 26 U.S.C. 7203. The district court sentenced petitioner to serve a prison term of one year (Pet. App. 8a).[1] The court of appeals affirmed (Pet. App. 24a).

On January 5, 1978, the United States Attorney for the Northern District of Texas filed an information charging petitioner with receiving $13,316.64 in gross income during 1975 and willfully failing to file an income tax return for that year (Pet. App. 9a-10a). In accordance with Fed. R. Crim. P. 7(a) and 7(c), the information contained a brief statement of the facts underlying the crime charged and bore the signatures of the United States Attorney and an Assistant United States Attorney. The information was

[1] The appendix to the petition contains a reproduction of the court of appeals' opinion, but its pages are unnumbered. For reference, we have treated the pages of petitioner's appendix as if they had been numbered consecutively from 1a to 24a.

neither verified nor supported by an oath or affidavit (Pet. App. 10a).

On the same day, the clerk of the district court issued, and a United States Marshal personally served upon petitioner, a summons directing him to appear before the district court and answer the charge set forth in the information. Petitioner appeared as ordered in the summons and was arraigned before the district court, which entered a plea of not guilty on petitioner's behalf, set a trial date, and released him on his own recognizance (Pet. App. 11a). Following his arraignment, petitioner filed motions challenging the summons issued on the unverified information. The district court denied these motions. The case proceeded to trial without petitioner ever having been held in custody.

The evidence at trial established that in 1975 petitioner was employed by the Federal Aviation Administration and had earned wages and interest income totalling $26,632.69 (Tr. 60, 89).[2] He filed a 1975 federal income tax return, Form 1040, but failed to answer any questions pertaining to income and deductions on that form, claiming that to do so would violate his rights under the Fourth and Fifth Amendments.[3]

[2] "Tr." refers to the transcript of proceedings in the district court.

[3] The return bore the following inscription: "I offer to amend or file again if you can show me how to do so without waiving my constitutional rights, especially my 4th and 5th Amendments" (Tr. 48).

ARGUMENT

1. Petitioner claims (Pet. 9-12) that the summons issued to secure his appearance at the trial on the information was defective under the Fourth Amendment because it was not accompanied by an oath or affirmation or a preliminary showing of probable cause. In his view, the government's failure to make a preliminary showing of probable cause deprived the district court of personal jurisdiction over him, and his conviction was therefore invalid.

This Court has held, however, "that a judicial hearing is not a prerequisite to prosecution by information" and that "illegal arrest or detention does not void a subsequent conviction." *Gerstein* v. *Pugh*, 420 U.S. 103, 118-119 (1975), citing *Frisbie* v. *Collins*, 342 U.S. 519, 522-523 (1952) (Michigan conviction not invalid where the defendant was kidnapped in violation of federal law in Illinois by Michigan police officers) and *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886) (conviction sustained where the defendant was forcibly abducted from Peru for trial in Illinois). See also *United States* v. *Lopez*, 542 F.2d 283, 284 (5th Cir. 1976); *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). Hence, even on the assumption that the summons was defective, as petitioner contends (Pet. 11), the court of appeals correctly held (Pet. App. 8a-9a) that a defect in the process used to secure petitioner's appearance at trial would not have deprived the district court of jurisdiction over him or have invalidated his conviction.

Petitioner also asserts (Pet. 9-12) that the government's failure to verify the information, or, in the alternative, the district court's failure to provide pretrial review of the information, violated his Fourth Amendment rights. But petitioner has never been arrested or detained or subjected to any search or seizure that would implicate the Fourth Amendment (see Pet. App. 11a-12a). Indeed, petitioner voluntarily complied with the summons by appearing, as ordered, at the arraignment. As the court of appeals correctly recognized, "[h]aving now been convicted beyond a reasonable doubt * * * [petitioner] cannot upset that conviction on the argument that no probable cause was shown prior thereto" (Pet. App. 20a).[4]

United States v. *Greenberg*, 320 F.2d 467 (9th Cir. 1963), on which petitioner relies (Pet. 12), does

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[4] The court of appeals nevertheless accepted petitioner's claim that Fed. R. Crim. P. 9(a), requires the government to make a preliminary showing of probable cause before a summons may be issued on an information (Pet. App. 13a) and suggested (Pet. App. 9a), as "a matter of practice," that petitioner should have been afforded a probable cause hearing. But the court also recognized (Pet. App. 14a) that a probable cause determination is not a constitutional requirement for the filing of an information. *Gerstein* v. *Pugh*, *supra*, 420 U.S. at 125 n.26; *Albrecht* v. *United States*, 273 U.S. 1, 8 (1927); *United States* v. *Funk*, 412 F.2d 452, 455 (8th Cir. 1969); *United States* v. *Pickard*, 207 F.2d 472, 474-475 (9th Cir. 1953). Similarly, in prescribing the form for criminal informations, Fed. R. Crim. P. 7 does not require them to be accompanied by a showing of probable cause. Thus, the court's interpretation of Rule 9(a) was dictum that was not essential to its holding that a procedural defect in the summons could not affect the validity of petitioner's conviction.

not aid him. *Greenberg* concerned the interpretation of the complaint and summons procedure of Rule 4(a) Fed. R. Crim. P., and the adequacy of a defective complaint to toll the statute of limitations under 26 U.S.C. 6531, a materially different issue from that presented here. Moreover, *Greenberg* turns on the fact that a summons and complaint is likely to require the defendant to post bail or suffer arrest and detention until a decision is made on the charges against him. Those considerations are not applicable here where petitioner was not detained.[5]

2. Petitioner also claims (Pet. 14-15) that the district court erroneously refused to instruct the jury that a claim of the Fifth Amendment is to be considered "a proper defense against the charge of willful failure to file a 1975 tax return" (Tr. 166). But the decisions of this Court have long held that the Fifth Amendment does not permit an individual to refuse to file a tax return. *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927); cf. *Garner* v. *United States*, 424 U.S. 648, 650 (1976). The courts below

[5] *United States* v. *Morgan*, 222 U.S. 274 (1911), and *United States* v. *Thompson*, 251 U.S. 407 (1920), upon which petitioner relies (Pet. 9-10), do not question the authorities holding that a court's jurisdiction over a defendant cannot be defeated because of the manner in which the defendant was brought before the court. The question presented in *Morgan* was whether Section 4 of the Pure Food and Drug Act of June 30, 1906, ch. 3915, 34 Stat. 769, restricted the government's power to initiate criminal prosecutions. *Thompson* is likewise irrelevant. It concerned the question whether the government was required to obtain leave of the court before resubmitting evidence to a grand jury after an earlier grand jury had failed to return a true bill on the same evidence.

therefore properly rejected petitioner's proposed instruction.[6] See *United States* v. *Johnson*, 577 F.2d 1304, 1310 (5th Cir. 1978).

[6] Petitioner contends (Pet. 14-15) that the court of appeals' ruling conflicts with the unreported memorandum decision of the Ninth Circuit in *United States* v. *Foster*, No. 76-3733 (Dec. 30, 1977), cert. denied, 435 U.S. 952 (1978). In *Foster*, however, the Ninth Circuit objected to the trial court's inadvertent failure to give an instruction on willfulness drawn from E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 35.31 (1977) (instruction approved by the Ninth Circuit in *Cooley* v. *United States*, 501 F.2d 1249, 1253 (1974)). *Foster* did not approve an instruction of the kind proposed by petitioner. To the contrary, the trial court here gave the very instruction (Devitt and Blackmar, *supra*, at § 35.31) that the Ninth Circuit found to be acceptable. It stated as follows (Tr. 153-154):

> The specific intent of willfulness is an essential element of the offense of failure to file an income tax return.
>
> The term "willfully," used in connection with this offense, means voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires him to file a timely return which discloses to the government facts material to the determination of his tax liability.
>
> There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payemnt of any taxes, for the defendant's failure to file to be willful under this provision of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good-faith misunderstanding of the requirements of the law.

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